Office-Supreme Court, U.S.
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SEP 4 1962
JOHN F. DAVIS, CLERK

No. 406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

BOLLING R. POWELL, JR.,
Petitioner

v.

JOHN W. MAHER,
Trustee in Bankruptcy of Ferro, Inc.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the writ	4
Argument	4
Conclusion	8
Appendix A	9
Appendix B	10

CITATIONS

Cases:

Alexander v. *Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192 (1935)	3; 4; 6
Cline v. *Kaplan*, 323 U.S. 97, 65 S.Ct. 155 (1944)	5; 6
Coffman v. *Cobra Mfg. Co.*, 214 Fed. 2d 489 (CA 9th 1954)	5
Columbia Foundry Co. v. *Lochner*, 179 Fed. 2d 630 (CA 4th, 1950)	7
In re Eakin, 154 Fed. 2d 717 (CA 2d, 1946)	5
In re Majestic Radio and Television Corp., 227 Fed. 2d 152 (CA 7th, 1955)	5; 6
In re Solar Mfg. Co., 200 Fed. 2d 327 (CA 3d, 1952)	7
In re Vadner, 17 Fed. 2d 721 (CA 9th, 1927)	5
Pickens v. *Roy*, 187 U.S. 177, 23 S.Ct. 78, 47 L.Ed. 128 (1902)	5; 6
Thalhimer Inc. v. *Florance*, 58 Fed. 2d 23 (CA 4th, 1932)	5
White v. *Schloerb*, 178 U.S. 542, 20 S.Ct. 1007, 44 L.Ed. 1183 (1900)	5

Statute:

Section 23(b) Bankruptcy Act, c. 541, 30 Stat. 552, as amended, U.S.C.A. Title 11, § 46(b)	2

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Petitioner prays that a Writ of Certiorari issue for review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 28, 1962.

Citation of Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit is printed in the Appendix hereto and is not yet reported in the Federal Reporter System. The opinion of the United States District Court for the

District of Columbia, filed under date of October 30, 1961, is set forth on pages 24-26 of the Joint Appendix printed for the use of the Court of Appeals for the District of Columbia Circuit, which Joint Appendix is certified as part of the record in connection with this Petition for Certiorari.

Jurisdiction

The District Court had jurisdiction pursuant to Title 11, § 306, D.C. Code 1951. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on June 28, 1962, and petition for rehearing was denied August 2, 1962. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Question Presented

Has the Court of Appeals below rendered a decision in conflict with the United States Court of Appeals for the Seventh Circuit and in conflict with applicable decisions of this Court in ruling that under the decision of this Court in the equity receivership proceeding of *Alexander* v. *Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed 192 (1935) a creditor of a bankrupt, who files a proof of claim secured by property of the bankrupt held adversely, consents to the summary jurisdiction of the bankruptcy court to order the turnover of such adversely held property notwithstanding the fact that the creditor expressly reserved the right of possession of the security in his proof of claim, resisted the bankruptcy trustee's petition for a turnover and made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court made its final order.

Statute Involved

The statute involved in this proceeding is the Bankruptcy Act of July 1, 1898, c. 541, § 23(b), 30 Stat. 552.

as amended, U.S.C.A. Title 11, § 46(b), which as amended, reads:

> (b) Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this title had not been instituted, unless by consent of the defendant, except as provided in sections 96, 107, and 110 of this title.

The exceptions referred to in 23(b) are not applicable in this matter.

Statement

In this bankruptcy proceeding the appellant expressly reserved his right to the continued possession of the property on which he asserted his lien when he filed his proof of claim. (JA 4) He also resisted the bankruptcy trustee's petition for a summary jurisdiction turnover order by formally protesting the exercise of such summary jurisdiction by the referee in his answer to trustees petition. (JA 12)

In the Objections of Trustee to Claim of Bolling R. Powell, Jr. and Counterclaim requesting a summary turnover order (JA 7) it is not alleged that the lien asserted by appellant is frivolous or merely colorable, nor did the referee find it frivolous or merely colorable. (JA 15)

The referee did not reject appellant's claim of the possessory lien as the Court of Appeals erroneously stated (see Appellant's Petition for Rehearing). The referee did not even hold a hearing on the validity of appellant's lien or undertake to adjudicate its validity. He peremptorily entered a turnover order and deferred such hearing and adjudication on the validity of appellant's lien until after such time as appellant should comply with his *ultra vires* summary jurisdiction turnover order. (JA 15) It is appellant's position that he has the right

to continue to hold this property of the bankrupt under his lien at least until a court of competent jurisdiction in a plenary suit by the trustee adjudicates that his lien is invalid after a due process hearing thereon.

The two Courts below affirmed the referee's summary jurisdiction turnover order on the ground that under *Alexander* v. *Hillman*, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192 (1935) appellant had consented to the summary jurisdiction of the bankruptcy court merely by filing his proof of claim.

Reasons for Granting the Writ

The writ of certiorari should be granted because:

1. This case involves an important question of Federal bankruptcy law.

2. The decision of the Court of Appeals of the District of Columbia in this case is in conflict with the decisions cited herein of this Court and with the decision cited herein of the United States Court of Appeals for the 7th Circuit on this important question of bankruptcy law. This conflict between the Circuits has been further complicated by decisions cited herein in the 3d and 4th Circuits undertaking to apply this Court's equity receivership decision in *Alexander* v. *Hillman* to bankruptcy proceedings under The Bankruptcy Act.

3. The granting of the writ will enable this Court to eliminate the conflict and confusion that now exists with respect to the jurisdiction of Federal bankruptcy courts, and what constitutes consent thereto.

Argument

Under the circumstances of this case, this Court has held that the consent to such summary jurisdiction which is required by Section 23(b) of the Bankruptcy Act is wanting, stating:

> Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objections. MacDonald v. Plymouth County Trust Co., supra, 286 U.S. at page 266, 267, 52 S.Ct. at page 506, 76 L.Ed. 1093. *Consent is wanting where the claimant has throughout resisted the petition for a turnover and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order.* *Cline* v. *Kaplan*, 323 U.S. 97, 99, 65 S.Ct. 155, 156 (1944) (Emphasis supplied)

This basic principle regarding the summary jurisdiction of a bankruptcy court to order turnover of property adversely held is one of long standing and has been affirmed and reaffirmed in a long line of decisions.

Pickens v. *Roy*, 187 U.S. 177, 23 St. 78, 47 L.Ed. 128 (1902)

White v. *Schloerb*, 178 U.S. 542, 20 S.Ct. 1007, 44 L.Ed. (1900)

In re Vadner, 17 Fed, (2d) 721 (CA 9th, 1927)

Thalhimer Inc. v. *Florance*, 58 Fed. (2d) 23 (CA 4th, 1932)

In re Eakin, 154 Fed. (2d) 717 (CA 2d, 1946)

Coffman v. *Cobra Mfg. Co.*, 214 Fed. (2d) 630, 489 (CA 9th, 1954)

In re Majestic Radio and Television Corp., 227 Fed. (2d) 152 (CA 7th, 1955)

The principal value of appellant's lien is the right of possession of the property of the bankrupt against which it is asserted. Appellant would be deprived of this valuable right by the referee's summary jurisdiction turnover order even though his lien ultimately be adjudicated valid.

The Courts below were in error in affirming the summary turnover order of the referee on the basis of this Court's decision in *Alexander* v. *Hillman*, supra.

That case did not involve consent to the jurisdiction of a bankruptcy court under Section 23(b) of the Bankruptcy Act (11 U.S.C.A. § 46(b)) because it did not involve a bankruptcy proceeding but an equity receivership. This Court held that where a non-resident creditor entered a voluntary appearance in the equity receivership proceeding by filing his unsecured claim without any reservation or special appearance as to jurisdiction, the equity court acquired jurisdiction of his person with respect to the receivers counterclaims.

In *Alexander* v. *Hillman*, this Court emphasized that its ruling dealt only with equity receivership proceedings and "that freedom as to procedure that necessarily belongs to courts of equity administering receiverships." Because that case had no bearing on consent to statutory summary jurisdiction in bankruptcy proceedings this Court did not even mention, much less over-rule its previous decision in *Pickens* v. *Roy*, *supra*, and *Cline* v. *Kaplan*, *supra*.

The Seventh Circuit has recognized that *Alexander* v. *Hillman* has no application to bankruptcy proceedings and particularly to consent to the summary jurisdiction of a bankruptcy court. *In re Majestic Radio and Television Corp.*, *supra*, the court stated:

> The case of Alexander v. Hillman, 296 U.S. 222, 56 S.Ct. 204, 80 L.Ed. 192, relied upon by the appellant's is not in point because the proceeding before the court there was one of receivership in equity to which Section 23 of the Bankruptcy Act did not apply. (p. 156)
>
> • • • •
>
> Jurisdiction of Bankruptcy Courts is created and limited by statute. (citations) And Section 23 of the Bankruptcy Act specifically limits jurisdiction over this adverse claimant unless he consents to that jurisdiction.

The cases of *Columbia Foundry Co.* v. *Lochner*, 179 Fed. 2d 630 (CA 4th 1950); and *In re Solar Mfg. Co.*, 200 Fed. 2d 327 (CA 3d 1952) cited by the District Court below applied *Alexander* v. *Hillman* to bankruptcy proceedings. However, those two cases are completely distinguishable from the case at bar because:

1. They did not involve consent to the extraordinary statutory summary jurisdiction of a bankruptcy court to order the turnover of property of the bankrupt adversely held as security by the claimant. In *Columbia Foundry Co.* the Fourth Circuit Court of Appeals distinguished that type of case (179 Fed. 2d at p. 635). Both *Columbia Foundry* and *Solar* involved wholly unsecured claims of creditors against property in the bankrupt estate already in the possession of the bankruptcy court.

2. In both *Columbia Foundry* and *Solar* the courts based their decisions on the point that "*implied consent* to the jurisdiction of the Bankruptcy Court had been given by the creditor when it filed its claim" (200 Fed. 2d at p. 330). Appellants consent cannot be *implied* in the case at bar where the appellant *expressly negatived* such consent both in his proof of claim and in his answer to trustees counterclaim. As was stated by this Court in *Cline* v. *Kaplan*, supra:

> Consent is wanting where the claimant has throughout resisted the petition for a turnover and where he made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order. (323 U.S. at p. 99)

Conclusion

r the foregoing reasons, the Petition for Writ of orari should be granted.

Respectfully submitted.

Bolling R. Powell, Jr.
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Pro se

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,756

BOLLING R. POWELL, JR., APPELLANT

v.

JOHN W. MAHER, Trustee in Bankruptcy of Ferro, Incorporated, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided June 28, 1962

Mr. William J. Powell, with whom *Mr. Bolling R. Powell, Jr.*, was on the brief, for appellant.

Mr. Roger Robb for appellee.

Before BASTIAN, BURGER and WRIGHT, Circuit Judges.

PER CURIAM: This is an appeal from an order of the District Court affirming an order of the Referee in Bankruptcy.

The order of the referee rejected the claim of appellant, who had filed a proof of claim with the trustee of the bankrupt corporation. The referee rejected the claim and further ordered appellant to turn over to the trustee a certain fund that was in the hands of appellant. The order of the referee related to the same fund as that in respect of which appellant had filed a proof of claim.

We affirm the order of the District Court on the reasoning and authorities recited in the decision of District Judge Holtzoff, reported *sub nomine* In re *Ferro, Incorporated*, 198 F.Supp. 244 (D.D.C. 1961).

Affirmed.

APPENDIX B

Validity of Attorney's Lien Asserted by Appellant

In its ruling (JA 24) the District Court (Holtzoff, J.) volunteered by way of dictum an opinion adverse to the validity of appellant's attorney's lien, stating that appellant was now barred from asserting it because he had not asserted it in the case of *John Thompson Beacon Windows, Ltd.* v. *Ferro, Inc. and Bolling R. Powell, Jr.*, (CA No. 2924-57).

The validity of appellant's attorney's lien or of his charges for legal services rendered Ferro, Inc. was not litigated or adjudicated in *John Thompson Beacon Windows* because the payments to Powell involved in that suit had not been made on account of legal services rendered by Powell to Ferro, Inc., but were repayments of cash loans made by Powell to Ferro, Inc.

In that suit Ferro, Inc. and Powell were joint defendants. No claims were interposed by Ferro, Inc. against Powell. There was no occasion, therefore, for Powell to plead his attorney's fee charges and lien therefor against Ferro, Inc. by way of defense, counterclaim or cross-claim.

In that suit a defense or counterclaim by Powell against Ferro, Inc. based on his attorneys fees and lien was not compulsory under Rule 12 or Rule 13(a) Federal Rules of Civil Procedure, 28 U.S.C.A. because

(a) That action was not a suit by Ferro, Inc. v. Powell; and

(b) Powell's claim for attorneys fees against Ferro, Inc. did not arise out of the transaction or occurrence that was the subject matter of Beacon Windows Ltd.'s claim against Ferro, Inc. and Powell, i.e. the repayment of Powell's cash loans to Ferro, Inc. In that action Powell's claim for attorneys fees could not even have

been a permissive counterclaim under Rule 13(b) for t
same reasons. Nor could it have been a permissive cro
claim against Ferro, Inc. as a co-defendant under Ru
13(g) because his claim for attorneys fees and a lie
therefore did not arise out of the transaction or occu
rence that was the subject matter of the original acti
by Beacon Windows Ltd.: